Censorial Community Values: An Unconstitutional Trend in Arts Funding and Access

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Allocation of government funding for art is not a new phenomenon. Unfortunately, the withdrawal of art funding and refusal to renew art funding also are not unique. Generally, the withdrawal of and refusal to renew government funds used for art purposes are constitutional. However, when a government actor seeks to withdraw or to refuse to renew funding for art because he or she believes the art will offend a community's values, the government actor performs an unconstitutional act under the First Amendment. Effectively, the government actor withdrawing or refusing to renew art funds censors the art because of perceived offense to the community's values. The use of censorial community values both to withdraw funding after an immediate perception of offense to the community and to refuse to renew funding later is unconstitutional when the government seeks "to encourage a diversity of views."

This note begins by coining and defining "censorial community values" and discusses why the use of censorial community values is unconstitutional viewpoint discrimination. The note continues by providing recent examples of a government actor's use of censorial community values. Next, this note examines the use of censorial community values under several key First Amendment cases. The author argues that the use of censorial community values by a government actor immediately to withdraw and later to refuse to renew art funding is unconstitutional. Finally, the author provides a test courts may use to recognize a government actor's use of censorial community values.

I. INTRODUCTION

On September 28, 1999, Mayor Rudolph Giuliani announced the cancellation of taxpayer money used to fund the Brooklyn Museum of Art.[1] This cancellation of funds was in response to the museum's decision to show the Sensation

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[1] Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 191 (E.D.N.Y. 1999); *see also* David Barstow, *Brooklyn Museum Sues to Keep Mayor from Freezing Its Funds*, N.Y. TIMES, Sept. 29, 1999, at A1 (stating that city officials cancelled the next scheduled payment of $497,554). The Brooklyn Institute of Arts and Sciences is the formal name of the Brooklyn Museum of Art. *See Brooklyn Inst. of Arts and Sciences*, 64 F. Supp. 2d at 187.

Exhibit.[2] The Sensation Exhibit included a painting by Chris Ofili,[3] entitled "The Holy Virgin Mary," which showed the Virgin Mary with a clump of elephant dung on one breast.[4] Mayor Giuliani stated that "taxpayer dollars should not 'be used to support the desecration of important national or religious symbol [sic], of any religion.'"[5] Thus, he attempted to use the values of his community, and the possible offense to people who shared those values, to cancel funds the museum received from the city.

Mayor Giuliani's actions were not unique. The use of community values to justify the cancellation of art funds, or access to art, is not a new phenomenon. For many years, officials have attempted to cancel art funding or access to art after granting such funding or access because of offense to community values.[6] The problem with this phenomenon is that there is no direct case law stating whether the use of community values to cancel funding for or access to art after either has been granted is constitutional.[7]

The First Amendment of the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."[8] This note will address the need for a rule to deal with censorial community values,[9] and will urge that the use of censorial community values is blatant viewpoint discrimination,[10] and therefore a violation of the First Amendment. For the purposes of this note, censorial community values will be defined as community values that are used to censor by withdrawing funds for, or access to, art the community finds offensive or against its values. This note will deal only with the use of community values to censor art after a government actor has granted funding or access in two contexts. First, this note will address the use of censorial

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[2] *Brooklyn Inst. of Arts and Sciences,* 64 F. Supp. 2d at 191. The Sensation Exhibit included approximately ninety works of nearly forty contemporary British artists. *Id.*

[3] Among several other artists featured in the exhibit, Chris Ofili received the Turner Award from the Tate Gallery. *Id.*

[4] Barstow, *supra* note 1, at A1.

[5] *Brooklyn Inst. of Arts and Sciences,* 64 F. Supp. 2d at 191; *see also* Barstow, *supra* note 1, at A1 ("The Mayor has described the painting by Mr. Ofili, who is a Roman Catholic, as Catholic-bashing.").

[6] *See infra* Part II.C; *see, e.g.,* Sefick v. City of Chicago, 485 F. Supp. 644, 649 n.14, 650–51 (N.D. Ill. 1979) (holding that a city official based her revocation of permission to show a sculpture on the alleged inappropriate and offensive content of the sculpture); Contemporary Arts Ctr. v. Ney, 735 F. Supp. 743, 744–45 (S.D. Ohio 1990) (issuing a preliminary injunction enjoining city officials from interfering with the Mapplethorpe Exhibit while the plaintiff art museum was charged with "pandering obscenity and the illegal use of minors in nudity oriented material").

[7] *See infra* Part III.

[8] U.S. CONST. Amend. I.

[9] *See infra* Part II.A (defining censorial community values).

[10] *See infra* Part II.B (discussing viewpoint discrimination).

community values immediately after art deemed offensive to the community is shown. Second, this note will address the constitutionality of using of censorial community values to deny funding that is typically renewed. This note will not address whether the use of community values is constitutional when used to decide initially whether to grant funds or access.[11]

As stated earlier, the Supreme Court has never specifically addressed whether censorial community values are constitutional. However, the Supreme Court recently allowed community values to be used in deciding whether to award funds.[12] The Supreme Court upheld the ability of the National Endowment for the Arts (NEA) to consider "general standards of decency and respect for the diverse beliefs and values of the American public."[13] The Supreme Court, however, also ruled that when the government is not speaking but spending "funds to encourage a diversity of views from private speakers," it may not use viewpoint-based restrictions.[14]

This note will urge that because the Court's most recent decision discussing community values was only a facial challenge to a law requiring the consideration of community values before the art received funding,[15] it is necessary to use several Supreme Court cases to formulate a rule that addresses censorial community values. Further, this note will show that because the use of censorial community values inevitably will constitute viewpoint discrimination and the government's purpose is to withhold ideas from the public, the use of censorial community values is a violation of the First Amendment both in the context of immediate withdrawal of funding and in later refusal to renew funding.[16] Finally, this note will conclude by discussing a test that courts may use when dealing with censorial community values.[17]

This note will begin by defining censorial community values in Part II.A and will discuss censorial community values as viewpoint discrimination in Part II.B. Next, Part II.C will provide recent examples of the use of censorial community values to withdraw arts funding or access after such funding or access was granted. Part III will formulate a rule and test for addressing censorial community

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[11] The author has serious doubts as to whether the consideration of community values before funding is granted is constitutional, but this note is limited to the use of community values in censoring art once funding or access already has been granted.

[12] NEA v. Finley, 524 U.S. 569, 570–71 (1998) (upholding a statute requiring the NEA to consider decency standards and community values in awarding grants because of the nature of the grant-making process).

[13] *Id.* at 572 (citing 20 U.S.C. § 954(d)(1)). Thus, NEA may consider diverse beliefs and American values in deciding whether or not to award grants. *See id.* at 587; *infra* Part III.A.

[14] Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 834 (1995). *See infra* Part III.B.

[15] *Finley*, 524 U.S. at 573.

[16] *See infra* Part III.D.1.

[17] *See infra* Part III.D.2.

values by discussing several Supreme Court cases and combining their holdings.

II. CENSORIAL COMMUNITY VALUES

This section defines censorial community values, explains why the use of censorial community values constitutes viewpoint discrimination, and finally, provides recent examples of the use of censorial community values. The use of censorial community values basically consists of a dialogue between the community and an official who cancels funds or access to art the community will find offensive. It is important to name and define this dialogue between the community and a government official because the use of censorial community values is not a unique phenomenon.[18] The use of censorial community values occurs any time an official acts on behalf of the community to cancel art funding or access out of belief that the community will find the art offensive.

A. *Censorial Community Values Defined*

Censorial community values are community values used to censor art deemed offensive by the community or one speaking on behalf of the community.[19] Censorial community values are used to justify the withholding of funds[20] promised or access granted to art or artists.

Censorial community values must be, by definition, censorial. "Censor" is defined as "to subject to a censor's examination, . . . to alter, delete, or ban completely after examination."[21] Furthermore, as a person or entity, a censor is a "supervisor or inspector especially of conduct and morals."[22] Thus, community values used to ban or delete art, particularly on the basis of the moral message of the art, are censorial. That is to say, censorial community values refer to those values used by a government entity to delete art after that art is deemed offensive

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[18] *See infra* Part II.C; *see also supra* note 6.

[19] The author recognizes that art is not the only form of speech subjected to censorship by community values. *See generally* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819 (1995) (addressing a student council's denial of printing funds for a religious student newspaper); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (addressing a challenge to a statute prohibiting the placement of a burning cross on public or private property); Rust v. Sullivan, 500 U.S. 173 (1991) (discussing a federal program providing funds for family planning services so long as they did not refer patients to or promote doctors performing abortions); Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (discussing a school board's decision to remove books from a school library). This note, however, focuses upon the context of arts funding and access, and the following analysis is structured accordingly.

[20] For a discussion of the benefits and dangers of government subsidization of speech, see Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression,* 80 MINN. L. REV. 543, 560–62 (1996).

[21] WEBSTER'S NEW INTERNATIONAL DICTIONARY UNABRIDGED 361 (3d ed. 1986).

[22] *Id.*

to the members of the community.

The withdrawal of funding or access to art injures the art, artist, or art museum within the definition of censorial. The withdrawal of funds from an artist or museum that shows the art will force the artist or museum to find other avenues to seek funding. If the artist or museum is unable to find such funding, the artist may be forced to discontinue producing art and the museum may be forced to close or limit its exhibits. Therefore, the withdrawal of funding or access to particular art is censorial because it may effectively delete or ban the art. While the act of withdrawing funding does not actually remove the art from a museum's walls or floors, it can lead to that result. A museum in need of certain funds to exist may make the decision to remove the art to secure its funds. Thus, the withdrawal of funding can effectively withdraw and ban the art, thereby censoring the art.

Community values are broad and may encompass the morals, ethics, standards of decency, religious values, and political ideologies of a community. "Community" is defined as "a unified body of individuals[;] . . . the people with common interests living in a particular area."[23] "Values" are defined as "something (as a principle, quality, or entity) intrinsically valuable or desirable."[24] Thus, a community value is something a group of people with common interests holds valuable. A community value could encompass a particular object such as a car or could be more abstract such as a particular religious belief. The importance of the image of the Virgin Mary to Catholics is a community value. Catholics, as a community, hold the image of the Virgin Mary as a symbol of their beliefs and value it accordingly.[25]

Thus, censorial community values are those beliefs, standards, or morals valued by a group of people with common interests used to ban art through the withdrawing funding or access to art after a government actor previously granted such funding or access.

B. *Censorial Community Values as Viewpoint Discrimination*

The use of censorial community values is viewpoint discrimination.[26] In

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[23] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 267 (9th ed. 1983).

[24] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2530 (3d ed. 1987).

[25] This is evidenced by Mayor Giuliani's response to the Sensation Exhibit on behalf of the community. *See infra* Part II.C.2.

[26] This note will not address whether the use of censorial community values constitutes viewpoint discrimination if a government actor used those values to stop an exhibit from being shown before the public has the chance to view it. That type of fact scenario might best be examined under prior restraint case law. For example, in *Southeastern Promotions, Ltd. v. Conrad,* the Court found that the directors of the Chattanooga Memorial Auditorium unconstitutionally restrained a production of "Hair" by rejecting an application to use the

Rosenberger v. Rector of the University of Virginia, the United States Supreme Court held: "[W]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... Viewpoint discrimination is thus an egregious form of content discrimination."[27] Here, the Court illustrates that viewpoint discrimination is unconstitutional because a government entity targets speech based on the viewpoint expressed by a speaker.[28] Therefore, according to *Rosenberger,* if the government entity acts out of disapproval or a community's disapproval for a particular viewpoint, the government entity discriminates on the basis of that viewpoint and therefore violates the First Amendment.

Accordingly, the government's act to curtail art because of the viewpoint expressed in that art[29] is viewpoint discrimination.[30] The government

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auditorium for the production. 420 U.S. 546, 547–48, 562 (1975). The Court held the application process lacked procedural safeguards required by a system of prior restraint. *Id.* at 562. The Court reiterated the required safeguards:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Id. at 560. Thus, in order for a government actor to use perceived possible offense to the community as a justification for curtailing art, the government actor would have to institute stringent procedural safeguards. This results because the Court views systems of prior restraint with skepticism. *Id.* at 558 ("Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.'") (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931))).

[27] 515 U.S. 819, 829 (1995) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

[28] *Id.* ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (citing Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983))).

[29] Some argue that the government's decision to fund some art and to decline to fund other art poses a major dilemma.

> [I]f government cannot fund all artists or all works, how must it choose? If it makes choices, it must adopt and apply standards. And if those standards are not simply broad and bland categories—for example, fund only oil paintings but not water colors...—then there is inevitable potential for content differentiation. The difficulty is deciding when that differentiation abridges or inhibits freedom of expression in ways the first amendment will not allow.

Robert M. O'Neil, *Artistic Freedom and Academic Freedom,* 53 LAW & CONTEMP. PROBS. 177, 191 (Summer 1990).

[30] *See* FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the

discriminates on the basis of viewpoint when it uses censorial community values to justify the withholding of previously granted funds or access to art. When the government or an agent of the government withholds funding because the art will offend the community, the government is targeting the art because of the views expressed in it. Indeed, in some contexts, viewpoint discrimination may be justified when the government initially is deciding whether or not to fund an activity.[31] In fact, some government funding decisions require the government to make choices based on viewpoint.[32] However, the government may not discriminate on the basis of viewpoint when it provides funding to "encourage a diversity of views from private speakers."[33]

Some believe that because the community funds the art through the paying of taxes, the community has a right to fund art consistent with its values and refuse to fund art inconsistent with its values.[34] Under recent Supreme Court case law,

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First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Furthermore, in determining whether the government's action is viewpoint discrimination, the court must consider whether the government acted out of disagreement with the message of the speech. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). In *Ward,* the Court held that a government could regulate expressive activity as long as that regulation was content neutral and any action taken was done without reference to the content of the speech. *Id.*

[31] *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that it is not viewpoint discrimination for the government to selectively fund a program when it wishes to encourage specific activities without being obligated to fund an alternative program which deals with the problem in a different manner); *Rosenberger,* 515 U.S. at 833 ("[W]hen the State is the speaker, it may make content-based choices.... [W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (citing *Rust,* 500 U.S. at 194).

[32] Marjorie Heins, *Viewpoint Discrimination,* 24 HASTINGS CONST. L.Q. 99, 110 (1996) (stating that the government may appropriately favor some speech when it makes decisions regarding art exhibits, research grants, and tax exemptions). *But see* Kristine M. Cunnane, *Maintaining Viewpoint Neutrality for the NEA:* National Endowment for the Arts v. Finley, 31 CONN. L. REV. 1445, 1472 (Summer 1999) ("Although the NEA is a selective funding program, selectivity does not justify viewpoint discrimination in supporting private speech.... [L]imited resources does not allow the government to exercise impermissible discretion over who should receive funding."); Redish & Kessler, *supra* note 20, at 568 (stating that viewpoint-based subsidies are presumptively unconstitutional and dangerous). "If we permit the government to make viewpoint-based subsidies, the government could choose to fund only those viewpoints with which it agreed, thereby dramatically skewing public debate and undermining First Amendment principles." *Id.*

[33] *Rosenberger,* 515 U.S. at 834. Furthermore, the government may not justify such viewpoint discrimination based on a scarcity of funds. *Id.* at 835.

[34] *Rust,* 500 U.S. at 193 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest,

there is some support for the argument that community values may initially be used to justify the funding of art.[35] However, this discussion does not deal with the use of censorial community values to grant funds initially. Rather, this discussion concerns the use of censorial community values involved in the decision to withdraw funding or access to art after a government entity already granted such funding or access. It is this use of censorial community values that constitutes viewpoint discrimination. In addition, the unconstitutional use of censorial community values can even be present in a refusal to renew funding if a government actor bases this refusal on past offense to the community's values.[36] When a government actor uses censorial community values, the decision to withdraw funding or access is a direct response to disagreement with the viewpoint expressed in the art.

When a person acting on behalf of the community seeks to withdraw funding or access to art because of the offense done to the community, that withdrawal constitutes viewpoint discrimination. In this scenario, the funding or access is

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without at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."). *Rust* specifically dealt with the provision of government funds for family planning services under Title X of the Public Health Service Act. *Id.* at 179. Congress required that the funds be expended only to support preventive family planning services that did not promote or refer patients to doctors who performed abortions. *Id.* at 179–80. Health care providers brought a First Amendment challenge to the prohibition from engaging in abortion related services. *Id.* at 181, 192. The Court ruled that "when that Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.

See also Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding a state welfare regulation which allowed Medicaid recipients to receive payments for childbirth services so long as they were not related to nontherapeutic abortions). "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475; J. Sarah Kim, Comment, *Defending the "Decency Clause" in* Finley v. National Endowment for the Arts, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 627, 647 (1993) ("Although the [congressional] spending power may not be used to induce recipients to engage in activities that would themselves be unconstitutional, government spending is not subject to neutrality in deciding which projects to fund." (citing South Dakota v. Dole, 483 U.S. 203, 210 (1987))). The author argued that because the NEA has a limited budget, it must always promote some art over others. *Id.* at 649. The author further argued that while the limited budget does not justify invidious discrimination, the consideration of general standards of decency is constitutional. *Id.*

However, it is important to note that the acts discussed above specifically deal with the provision of funds prior to any speech or action. The Court ruled that the government does not have to fund all speech when it is initially deciding whether to provide money. However, *Rust, Maher,* and *Finley* do not address the issue of whether the government may withdraw funds after the community takes offense to speech the government funded already.

[35] *See* NEA v. Finley, 524 U.S. 569, 586 (1998); *see also infra* Part III.A.

[36] *See infra* Part IV.D.1.a for a discussion of the unconstitutionality of using censorial community values as a basis for refusal to renew funding.

withdrawn specifically because of the viewpoint expressed in the art. The viewpoint offended, or had the potential to offend, the community based on the community's values. Therefore, in retaliation to that offense, a government entity withdraws the funding or access that enables the art's viewpoint to be expressed and thereby censors the art. Thus, the use of censorial community values is always viewpoint discrimination because it is used to curtail a viewpoint on the basis of that viewpoint.

C. *Recent Examples of Censorial Community Values*

1. Cuban Museum of Arts and Culture, Inc. v. Miami[37]

In December 1989, the City of Miami informed the Cuban Museum of Arts and Culture that the city intended to terminate the museum's lease because of the museum's failure to discontinue the sale of certain artwork.[38] The city took these actions in response to the controversy resulting from the museum's decision to sell art created by artists who had not renounced the Castro regime or who lived in communist Cuba.[39] In response to the controversy,[40] the Miami City Commission investigated alleged violations of the city's lease agreement with the museum and conducted numerous audits of the museum's records.[41] Due to the controversy surrounding the auction, the city decided not to renew the museum's lease as long as the museum's administration remained the same.[42] The museum then sued the city alleging a violation of the First Amendment and the city began eviction proceedings.[43] The trial court found that the city commenced its eviction proceedings as a result of the controversial and unpopular views the museum advanced.[44]

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[37] 766 F. Supp. 1121 (S.D. Fla. 1991).

[38] *Id.* at 1123.

[39] *Id.* at 1122. The controversial acts resulting from the auction of the artwork included the burning of a painting after purchase and the bombing of a car owned by one of the directors of the museum. *Id.*

[40] "The auction provoked a commotion among Cuban exiles here and divided the museum's board of directors between those who viewed the artists as representatives of the Communist leader of Cuba, Fidel Castro, and those who argued for tolerance and artistic freedom." Mireya Navarro, *How Controversial Art Killed a Museum; In a Case that Parallels 'Sensation,' Cultural Leaders Took on Miami*, N. Y. TIMES, Oct. 23, 1999, at B1.

[41] *Cuban Museum of Arts*, 766 F. Supp. at 1123. The commission also investigated allegations that the museum instituted an admission charge against the city's intent of free admission. *Id.*

[42] *Id.* at 1124.

[43] *Id.*

[44] *Id.* at 1129. "[T]he City nonetheless appears to have fallen victim to the local community's intolerance for those who chose to provide a forum for controversial artists." *Id.* at

The city attempted to evict the museum through the use of censorial community values because it used the community's reaction and offense to the art sold by the museum to censor the art and museum. The trial court specifically found that the city did not take action against the museum until controversy arose surrounding the auction.[45] The city only began its attempt to evict the museum, and thereby withdraw a benefit already conferred upon the museum, when the museum's actions offended the community's values and opinions regarding communist Cuba.[46]

Therefore, this incident is one example of the use of censorial community values. The city attempted to censor the museum because of the art auctioned by the museum, the message of that auctioning, and the values the community asserted against Cuba. Furthermore, the city's actions constituted blatant viewpoint discrimination in it attempted to censor the museum because the community disagreed with the viewpoint connected with the art—the approval, or appearance of approval, of communist Cuba. The trial court found that the city would not have attempted to evict the museum if the museum had not exhibited the controversial works.[47]

While the city's actions were not based on offense to the content of the art, offense to community values was still the basis for the city's actions. The community was offended with the implication of support for communist Cuba through the auctioning of the art not the actual art. However, the community's values, strong beliefs against communism, were indeed offended by the auctioning of the art, and these values induced the city to attempt to censor the art. Thus, the City of Miami used censorial community values in its attempt to evict the museum.

1126. "The conduct of the City Commission with respect to the asserted grounds for the denial of continued possession reveals that the reasons asserted were either minor concerns or a pretextual basis upon which to remove the Cuban Museum and its present directors." *Id.* at 1127.

[45] *Id.* at 1127.

> Almost immediately following the controversial exhibition and auction, the City began looking into virtually every allegation made against the Cuban Museum and its present directors. The City quickly ordered investigations of the auctions in order to detect a basis for eviction.... More importantly, however, the court notes that the Commission never exhibited and real concern over possible self-dealing and auction profits in connection with directors other than those who had been linked with the controversial art.

Id. Thus, the justifications—concern for self-dealing and auction profits—the city advanced in its attempt to evict the museum were basically a pretext for the real reason the city wanted to evict the museum: the museum's decision to show controversial art.

[46] *See id.*

[47] *Id.*

2. Brooklyn Institute of Arts and Sciences v. City of New York[48]

On October 1, 1999, the Brooklyn Museum of Art filed suit against the City and Mayor of New York in response to city officials' threats to withhold, and actual withholding of, the city's monthly payment of $497,554 to the museum.[49] The city withheld the monthly payment to the museum in response to an art exhibit[50] Mayor Rudolph Giuliani found offensive both to him and the community.[51] Furthermore, the city commenced an ejectment action in state court stating that the museum had violated its lease.[52]

In issuing an injunction against the city, the trial court discussed the right of the government not to provide benefits[53] and the provisions of the contract and lease between the city and the museum.[54] The trial court found that the lease and contract between the city and the museum did not allow the mayor to withdraw funding because of disapproval of an exhibit.[55] The trial court specifically

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[48] 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

[49] *Id.* at 191–92. The museum sought declaratory and injunctive relief "to prevent the defendants from punishing or retaliating against the museum for displaying the Exhibit." *Id.*

[50] The art exhibit contained a painting entitled "The Holy Virgin Mary" by Chris Ofili. The painting of the Virgin Mary has a clump of elephant dung on one breast. Barstow, *supra* note 1, at A1.

[51] *Brooklyn Inst. of Arts and Sciences,* 64 F. Supp. 2d at 191. In reference to the art exhibit:

> The Mayor stated that this work "offends me" and "is sick," and he explained his decision to terminate City funding as follows:
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> > You don't have a right to a government subsidy to desecrate someone else's religion. And therefore we will do everything that we can to remove funding from the [Museum] until the director comes to his senses. And realizes that if you are a government subsidized enterprise then you can't do things that desecrate the most personal and deeply held views of the people in society.
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> *Id.*

[52] *Id.* at 192. The city alleged that the museum violated its lease by charging an admission fee for the exhibit, violating the museum's obligation to educate children because the exhibit was inappropriate for children, and furthering the commercial interests of private parties as opposed to public purposes because the owner of the exhibit is a client of a commercial entity that also provides funds to the museum. *Id.*

[53] The trial court stated that this case was not about "requiring the taxpayer to support a particular point of view" but was about "barring government officials from invidiously discriminating against ideas they find offensive, either to themselves or to members of the community." *Id.* at 201.

[54] *Id.* at 203–04.

[55] *Id.* at 204. The trial court stated,

> If [the Museum] now sold its collections and became a pornography museum, the withholding of operating subsidies and the claims of a lease or contract violation would arise under vastly

compared the situation to the Miami incident[56] and stated that New York's claims of a lease and contract violation also were pretextual.[57] The trial court stated that the city's action to withhold the funding was discrimination aimed at suppressing ideas with which the city and mayor disagreed.[58] Despite the city's early promise to appeal the injunction, both the museum and the city agreed to drop their lawsuits and agreed to a settlement.[59]

Like the incident with the Cuban Museum of Arts and Culture, New York's actions also constituted the use of censorial community values. The mayor attempted to censor the art by withdrawing museum funding because of the offense he took to the exhibit and the offense he believed the community would take.[60] The mayor used the community's religious values[61] to justify the censorship—withholding of funds and ejectment from the museum's premises—

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different facts from those presented here. The City and the mayor have not shown that the funding provided has not been spent for the purposes authorized.

Id.

[56] *See supra* Part II.C.1.

[57] *Brooklyn Inst. of Arts and Sciences*, 64 F. Supp. 2d at 203.

[58] *Id.* at 200.

> The decision to withhold an already appropriated general operating subsidy from an institution which has been supported by the City for over one hundred years, and to eject it from its City-owned building, because of the Mayor's objection to certain works in a current exhibit, is, in its own way, to "discriminate invidiously in its subsidies in such a way as to 'aim [] at the suppression of dangerous ideas.'"

Id. (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983)). *See also* Cunnane, *supra* note 32, at 1445 ("The United States government is not required to fund the arts.... When the government chooses to do so, however, it cannot employ a funding process that constitutes viewpoint discrimination in violation of... First Amendment authority.").

[59] Alan Feuer, *Giuliani Dropping His Bitter Battle With Art Museum*, N.Y. TIMES, Mar. 28, 2000, at A1 (stating the museum dropped its First Amendment lawsuit and the city dropped its eviction proceedings). However, despite the settlement the city maintained the mayor's right to be offended by the exhibit. *Id.* ("Nonetheless, (Michael O. Hess, the City's corporate counsel) said, 'part of that exhibit was obviously religion-bashing, and the mayor took exception to that, and rightly so.'").

[60] Evidently, the mayor's perception of the community response was not far from wrong for some members of the community. The Orthodox Union's president, Mandell Ganchrow, stated, "'Displaying a religious symbol splattered with dung is deeply offensive and can hardly be said to have any redeeming social or artistic value.... Today the offense is perpetrated against a Christian symbol. Tomorrow it might be a Jewish ritual item, and then of another faith.'" Barstow, *supra* note 1, at A1.

[61] "On September 28, the mayor publicly stated that taxpayer dollars should not 'be used to support the desecration of important national or religious symbol [sic], of any religion.' A City press release that day denounced 'an exhibit which besmirches religion and is an insult to the *community*.'" *Brooklyn Inst. of Arts and Sciences*, 64 F. Supp. 2d at 191 (emphasis added).

of the museum. The mayor's act was vengeful because he sought to withdraw funding after the city granted it. Viewpoint discrimination was evident because the mayor withheld the funding due to his disapproval of the viewpoint expressed in the exhibit.[62] Therefore, the mayor's attempt to withhold funding already allocated to the museum and thereby force the museum to remove the art because of an exhibit's offense to the community, was a use of censorial community values.

3. *The Detroit Institute of Arts' Use of Censorial Community Values*

On November 19, 1999, the director of the Detroit Institute of Arts withdrew an exhibit after the exhibit was shown for two days.[63] The new director[64] of the museum shut down the exhibit out of concern that it would offend the community.[65] The spokesperson for the museum stated, "[W]hen the people inside the museum are questioning [the exhibit], it was time to reconsider. . . . We had a responsibility to the artist, but a greater one to the community."[66]

Unlike the incidents in Miami and New York City, this incident did not involve a government entity's attempt to withhold funding or access to art. However, the museum director's act of withholding access was indeed a use of censorial community values. The director closed the exhibit and censored the art that the community could find offensive. Like the incidents in Miami and Cuba, the director's act was viewpoint discrimination—he withdrew the exhibit because of the viewpoint the exhibit contained. The rule for censorial community values that will be articulated in Parts III.D and C will specifically deal with the government's use of censorial community values. However, the Detroit Institute of Arts' use of censorial community values demonstrates that private actors such as museum directors also are influenced by community values.

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[62] The trial court stated that "the Museum, having been allocated a general operating subsidy, can[not] now be penalized with the loss of that subsidy, and ejectment from a City-owned building, because of the perceived viewpoint of the works in the Exhibit." *Id.* at 202.

[63] Robyn Meredith, *Museum Shuts Provocative Exhibit, Igniting Flap,* CHI. TRIB., Nov. 23, 1999, at 10.

[64] Evidently, the new director was unaware of the contents of the exhibit before the exhibit opened. *See id.* The exhibit contained "a toy Jesus wearing a condom, a pile of human excrement and a Brazil nut labeled with a racial epithet." *Id.*

[65] *Id. See also* Julia Duin, *Museum Pulls Plug on 'Shock Art' Exhibit,* WASH. TIMES, Nov. 23, 1999, at A7 ("[The director] then issued a press release saying he 'reluctantly' decided to postpone the exhibit on the grounds it would 'cause offense to important parts of our community.' Detroit has high concentrations of blacks, Catholics . . . and Muslims.").

[66] *Id.*

III. FORMULATING A RULE FOR DEALING WITH CENSORIAL COMMUNITY VALUES

There is no direct rule or case law for dealing with the use of censorial community values to withdraw funding for or access to art. The most recent Supreme Court case in this area seems to advocate the consideration of community values in the arts context, at least when this consideration is statutorily mandated.[67] Therefore, in order to formulate a rule to apply to the issue of censorial community values, it is necessary to consider several Supreme Court cases.

A. National Endowment for the Arts v. Finley[68]

National Endowment for the Arts v. Finley found Title 20 U.S.C. § 954(d)[69] facially valid.[70] Section 954(d) required the NEA to consider, among other things, diverse American beliefs and values when it judged the artistic merit of grant applications.[71] The Court reasoned that § 954(d) did not silence artists[72] —and thereby violate the First Amendment—because it did not "expressly 'threaten censorship of ideas.'"[73] The Court stated that the content-based considerations required by the statute were already inherent[74] in the nature of grant-making to

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[67] *See generally* NEA v. Finley, 524 U.S. 569 (1998).

[68] 524 U.S. 569 (1998).

[69] Title 20 U.S.C. § 954(d) provides that the chairperson of the NEA "shall ensure that '. . . artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.*'" *Finley,* 524 U.S. at 576 (emphasis added).

[70] *Id.* at 573.

[71] *Id.* at 576.

[72] Many authors have argued that the decision in *Finley,* upholding the ability of the NEA to consider values of the public, will have a chilling effect upon artists and their work. *See* Cunnane, *supra* note 32, at 1477 ("The chilling effect moves beyond mere government funding because of the extensive influence that the NEA has on the arts community, in that private funding of the arts generally follows the NEA's choices." (footnote omitted)); Andrea K. McKoy, Note, National Endowment for the Arts v. Finley: *First Amendment Free Speech No Longer Guaranteed for the Arts,* 50 MERCER L. REV. 791, 807 (1999) ("Because the NEA looks at all of an artist's work, including prior work, in deciding whether to award funding, artists will be forced to conform work produced with private funds to that which the NEA is more likely to deem decent and respectful." (footnote omitted)).

[73] *Finley,* 524 U.S. at 583.

[74] *But see* Cunnane, *supra* note 32, at 1470 (stating that the "clear-cut intent is to 'favor one speaker over another' by directing NEA funding to art projects that do not express controversial or offensive messages" (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 835 (1995))). Cunnane provides one example stating, "[A]rt that is 'respectful' of religious beliefs and values, such as a devotional depiction of the Madonna and Child could be funded,

art.[75] Furthermore, the Court said that in contrast to other areas the government subsidizes,[76] when the government funds art through the National Endowment for the Arts, it cannot do so to "'encourage a diversity of views from private speakers.'"[77]

However, the Court specifically distinguished the facial challenge in *Finley* from a potential case that included discrimination in a particular funding decision.[78] The Court stated,

> If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not "ai[m] at the suppression of dangerous ideas,"[79] ... and if a subsidy were "manipulated" to have a "coercive effect," then relief could be appropriate. [80]

Furthermore, the Court stated that "a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'"[81]

Thus, in dicta the Court stated that the statutory requirement to consider the diverse American values in granting funding to art was constitutional on its face[82]

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whereas a different depiction of the same subject-matter with sexual overtones would be rejected." *Id.*

[75] *See Finley*, 524 U.S. at 585 (explaining that "[t]he NEA has limited resources and it must deny the majority of the grant applications that it receives").

[76] The Court distinguished several cases that struck government action curtailing speech from the art grant-making process. For example, the Court stated that government subsidization of art through the NEA was unlike the factual scenario in *Rosenberger* because funding was available to all student organizations so long as the organizations related to educational purposes. *Id.* at 586 (citing Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 824 (1995)). The Court also distinguished cases where a government actor was required to allocate public benefits objectively such as in granting equal access to a school auditorium or a municipal theater. *Id.* (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386 (1993); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975)).

[77] *Id.* at 586 (citing Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995)).

[78] *Id.* at 587. "Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination." *Id.*

[79] *Id.* (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550, (1983)).

[80] *Id.* (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

[81] *Id.* (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

[82] Some have argued that when the government funds art, it must always make a choice based on the content of that art, thus, content or viewpoint discrimination is not the proper way to analyze discriminatory government funding. *See* Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 207

but may not be constitutional if used to discriminate against a particular viewpoint. The Court also stated in dicta that this viewpoint discrimination could be evidenced by the use of values as a penalty against disfavored viewpoints, as a coercive effect to control viewpoints, or as a burden to allow only certain viewpoints to enter the marketplace of ideas.[83] Because the Court found none of these motivations present, the statute was upheld as constitutional.[84]

The use of censorial community values directly corresponds to the dicta in *Finley*. Because censorial community values are used after a viewpoint expressed in art is discovered, examined, and deemed offensive,[85] censorial community values are used to drive a viewpoint from the marketplace. For example, when New York City's Mayor attempted to censor art by withdrawing funding from the Brooklyn Museum of Art by showing art that offended people of the Catholic religion,[86] the mayor attempted to drive the art from the marketplace.[87] Thus, because censorial community values were used to ban a piece of artwork and because they represent viewpoint discrimination, the dicta in *Finley* would hold the use of censorial community values unconstitutional.

B. Rosenberger v. Rector of the University of Virginia[88]

In *Rosenberger*, the Court found unconstitutional the university's withholding of authorization for payments to outside contractors for the printing of a religious group's newspaper because of the group's religious affiliation.[89]

(1994). Here, Chemerinsky stated that the proper inquiry was whether the government ensured procedural fairness under the Fifth and Fourteenth Amendments. *Id.* at 211. Chemerinsky clearly stated, specific, and non-discriminatory criteria for how government choices be made and the ability of courts to scrutinize government decisions to ensure that the government properly applied the criteria. *Id.* at 212–13.

[83] *Finley*, 524 U.S. at 587.

[84] *Id.*

[85] "'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (quoting FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978)).

[86] *See supra* Part II.C.2.

[87] The attempt to drive the art from the marketplace is evidenced by the mayor's statement, "[W]e will do everything that we can to remove funding from the [Museum] until the director comes to his senses. And realizes that if you are a government subsidized enterprise then you can't do things that desecrate the most personal and deeply held views of the people in society." Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 191 (E.D.N.Y. 1999). This statement directly illustrates how the mayor intended to coerce the museum, by withdrawing funding, into withdrawing the viewpoint expressed in the art.

[88] 515 U.S. 819 (1995).

[89] *Id.* at 821. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more

The Appropriations Committee of the Student Council denied the group's request to pay for printing specifically because of the group's religious activity.[90] The Court found that the university denied funding based on viewpoint discrimination.[91] The Court stated:

> We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.... It does not follow, however,... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds *to encourage a diversity of views from private speakers.*[92]

The Court found that because the university implemented a program to pay for printing expenses of student newspapers to encourage a diversity of views,[93] and then denied such funding to a religious group because of its viewpoint, the university discriminated against that group and violated the First Amendment.[94]

Hence, the Court stated that when the government is not the speaker, but instead is funding private speakers[95] to "encourage a diversity of views,"[96] it may not discriminate on the basis of viewpoint. The holding in *Rosenberger* is essential to the analysis of censorial community values in the arts context. When the government is spending money or providing leased premises for art to encourage a diversity of views, the government then cannot discriminate against some of those views. For example, in *Brooklyn Institute of Arts and Sciences v. City of New York,* the trial court found that the annual final report and budget request forms required by the city did not require the museum to submit detailed

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blatant.... Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* at 829 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

[90] *Id.* at 827.

[91] *Id.* at 832.

[92] *Id.* at 833–34 (emphasis added) (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

[93] The Court distinguished between a situation in which the government may discriminate on the basis of content such as when the discrimination serves the purpose of the forum for the speech and a situation in which the government discriminates between permissible speech. *Id.* at 829–30. The Court stated that "viewpoint discrimination ... is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830.

[94] *Id.* at 834–37.

[95] Some argue that when the government funds private speakers, the government is in a good position to manipulate the public. *See* Redish & Kessler, *supra* note 20, at 570. Redish & Kessler state:

> When a government officer speaks,... the listener is able to "discount" the expression on the basis of the speaker's apparent self-interest. However, when government fosters dissemination of its positions by means of funding private party expression, the danger arises that the public will fail to "discount" the views expressed.

Id. (footnote omitted).

[96] Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 834 (1995)

information concerning the art to be shown in the museum.[97] This situation is different from the *Finley* case wherein the Court stated that the National Endowment for the Arts does not seek to encourage a diversity of views.[98] Because the city did not require, in the report, the museum to gain the city's approval of art before exhibiting it, it can be argued that the city provided funding to the museum to encourage a diversity of views. If the city did not want to encourage a diversity of views, but instead wanted veto power over the art shown in the museum, one could assume the city would have required detailed information on the art at some point in time.

The use of censorial community values in the context of art funding, when the government wants to encourage a diversity of views, is unconstitutional. Because the use of censorial community values constitutes viewpoint discrimination,[99] and because the government cannot discriminate on the basis of viewpoint when encouraging a diversity of views, the use of censorial community values in the arts context is unconstitutional. Government viewpoint discrimination and encouragement of a diversity of views are contradictory under *Rosenberger;* thus, the government's use of censorial community values to ban art the community finds offensive violates the rule set forth in *Rosenberger.*

C. Board of Education v. Pico[100]

In *Pico,*[101] the Supreme Court considered a school board's action in removing from the elementary and secondary school libraries books characterized as "'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy'".[102] The school board argued that it had a duty to protect the school children from moral danger.[103] Furthermore, the school board argued that "they must be allowed

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[97] 64 F. Supp. 2d 184, 189–90 (E.D.N.Y. 1999).

[98] NEA v. Finley, 524 U.S. 569, 586 (1998).

[99] *See supra* Part II.B.

[100] 457 U.S. 853 (1982).

[101] For background and discussion on *Board of Education v. Pico,* see generally Helen M. Quenemoen, Case Comment, Board of Education v. Pico: *The Supreme Court's Answer to School Library Censorship,* 44 OHIO ST. L.J. 1103 (1983).

[102] *Pico,* 457 U.S. at 857 (citing Bd. of Educ. v. Pico, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)); *see also* Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976) (stating that a school board could not remove books from a school library based on "the social or political tastes of school board members."); Right to Read Def. Comm. of Chelsea v. Sch. Comm., 454 F. Supp. 703, 711 (D. Mass. 1978) (stating a school board's discretion to determine what books will go into the school library is not the same as the discretion to remove books from the school library).

[103] *Pico,* 457 U.S. at 857. For a discussion of the tension between school board power to structure school curriculum and student rights to information, see Heins, *supra* note 32 at 159–60 ("Before *Pico,* some courts invalidated school censorship decisions without sharply distinguishing between content and viewpoint discrimination. Others made the distinction,

unfettered discretion to 'transmit community values' through the . . . schools."[104]

The *Pico* plurality[105] stated:

> Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.[106]

The plurality asserted that a school board does not have the power to remove books from school libraries because the school board dislikes the ideas expressed in those books.[107] The plurality stated that to do so would "'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[108]

Thus, in *Pico,* the plurality stated that the use of censorial community values in the context of school libraries is unconstitutional if the government's purpose is to withhold information from school children. This can be analogized to the use of censorial community values in the context of arts funding and access. Like the situation in *Pico,* the City of Miami attempted to withdraw speech from the community. The two incidents are not identical because in *Pico* the school board was accused of seeking to remove the offensive speech by actually removing the books from the school library.[109] In *Cuban Museum of Arts,* the city attempted to remove the offensive speech indirectly by evicting the museum.[110] However, in both cases, the issue was whether the government actor attempted to remove

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leaving only a narrow window for First Amendment claims, or appeared to reject judicial intervention entirely." (footnote omitted)).

[104] *Pico,* 457 U.S. at 869.

[105] "Because a majority of justices did not concur in any one opinion, the authority of *Pico* is limited." Quenemoen, *supra* note 101, at 1113. For a discussion on the precedential value of the plurality decision in *Pico,* see *id.* at 1113–15. I recognize that the precedential value of *Pico* is uncertain. However, the plurality's rationale is particularly persuasive within the context of art funding. The discussion of *Pico* plurality's rationale is provided not as black letter law, but as another way of considering the use of censorial community values.

[106] *Pico,* 457 U.S. at 871 (footnote omitted).

[107] *Id.* at 872.

[108] *Id.* at 872 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). The concern for a school board prescribing what is orthodox reading material in the school library is analogous to concern for a government actor prescribing what is orthodox in the context of art funding or access. If a government actor removes funding from or access to art, the government will limit the type of art the public can view.

[109] *See id.* at 857.

[110] *See* Cuban Museum of Arts v. City of Miami, 766 F. Supp. 1121, 1125–27 (S.D. Fla. 1991); *see also supra* Part II.C.1.

speech for its offensiveness to the community's values.[111]

According to the *Pico* plurality therefore, at least in the context of school libraries, the use of censorial community values is unconstitutional. That is to say, because *Pico* states that the school board's action is unconstitutional if the motivation for that action is the desire to deny information to children, the use of censorial community values is unconstitutional because it encompasses the desire of an official to deny information because of that information's offensiveness. This analysis can be applied to the context of art funding and access because the desire of an official in withdrawing such access based on community values is the desire to deny access to information; thus, the use of censorial community values in the arts context is also unconstitutional.

D. *The Rule for Censorial Community Values*

This section will discuss a rule for finding the use of censorial community values unconstitutional and will provide courts with a test to recognize the use of censorial community values.

1. *The Unconstitutionality of Censorial Community Values*

By reading *Finley, Rosenberger,* and *Pico* in conjunction, one can see that a government actor's use of censorial community values is unconstitutional when used to withdraw funding from, or access to, art immediately after the community is offended or in refusing to grant renewal funding later.[112] This section will

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[111] In *Pico,* the Supreme Court did not decide whether the school board did indeed remove the books because of the board's animosity toward the books' message. *Pico,* 457 U.S. at 872–75. Instead, the Court determined that the evidence raised a genuine issue of material fact as to whether the board was motivated by the desire to deny access to the books and stated summary judgment could not be found in favor of the school board. *Id.* at 872.

[112] Some may argue that finding a government entity's use of censorial community values unconstitutional will have an adverse effect on art funding and encourage governments to withhold funding altogether to avoid funding art that will offend a community's values. In fact, the government posed a similar argument in *FCC v. League of Women Voters,* 468 U.S. 364, 390 (1984). In *League of Women Voters,* the government argued Congress would retaliate against editorial comments made on several noncommercial television and radio stations by withdrawing federal funds from all broadcasting stations. *Id.* at 390. ("An underlying supposition of the Government's argument in this regard is that individual noncommercial stations are likely to speak so forcefully on particular issues that Congress, the ultimate source of the stations' federal funding, will be tempted to retaliate against these individual stations by restricting appropriations for all of public broadcasting."). The Court was not persuaded by this argument because realistically the Court could not see Congress punishing all broadcasting stations for the distinctive messages of several particular broadcasting stations. *Id.* at 391. The risk that government entities will withhold funding from all art museums in response to disagreement with several pieces of art seems equally unlikely. Because government entities have a history of funding art, it seems unlikely that government entities will cease to fund art

address the unconstitutionality of using censorial community values in two contexts: a government entity's immediate withdrawal of funding for art and a government entity's later refusal to renew funding for art.

a. *Immediate Withdrawal of Funding or Access to Art*

While *Finley* does allow the National Endowment for the Arts to consider community values in granting funding through a statutory mandate, it also states that government may not act to suppress ideas simply because the government disagrees with those ideas.[113] The use of censorial community values is the "'manipulat[ion]' [of a subsidy] to have a 'coercive effect....'"[114] When a government official attempts to use funding or a subsidy to coerce a museum into withdrawing an exhibit because the exhibit offends the community's values, the government official acts against the dicta in *Finley*.

In addition, under the *Finley* dicta, a government entity that is entitled to consider community values in awarding funds may not use its power to penalize disfavored viewpoints.[115] The withdrawal of funds or access to art through the application of censorial community values is indeed a penalty against a disfavored viewpoint. Through the use of censorial community values, a government entity punishes art, a museum, or an artist by withdrawing money or access to art because the government entity believes the art conflicts with the community's values. Thus, the use of censorial community values is unconstitutional under the dicta in *Finley* because a government entity uses censorial community values to coerce or penalize a museum or artist because of the viewpoint expressed in the art.

The *Finley* court stated that the government, through the National Endowment for the Arts, does not indiscriminately grant funding to encourage a diversity of views because of the competitive nature of the NEA funding process.[116] However, it can be argued that within other parts of the arts funding context, the government does spend money to encourage a diversity of views. For example, in *Brooklyn Institute of Arts and Sciences,* the city never attempted to

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simply to prevent several pieces of offensive art from being exhibited. *See* Michael Wingfield Walker, *Artistic Freedom v. Censorship: The Aftermath of the NEA's New Funding Restrictions,* 71 WASH. U. L.Q. 937, 938–40 (1993) (providing a brief history of the government funding of art).

[113] *See* NEA v. Finley, 524 U.S. 569, 587 (1998) (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983)).

[114] *Id.* (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)).

[115] *Id.*

[116] *Id.* at 586.

condition the funds on its prior approval of the art exhibits.[117] Furthermore, the city's provision of funds is hardly as competitive as the NEA's grant-making process. Thus, in some contexts, a government entity indeed does award funds to encourage a diversity of views. If a government entity does encourage a diversity of views, it may not enforce viewpoint-based restrictions.[118]

The use of censorial community values in the context of arts funding when the government seeks to encourage a diversity of views is unconstitutional under *Rosenberger*. As discussed in Part II.B, the use of censorial community values is viewpoint discrimination. That is to say, the withdrawal of art funding because the community disapproves of the art and the message relayed in the art is viewpoint discrimination.[119] The use of censorial community values proves that the community dislikes, or that a government entity fears that the community will dislike, the viewpoint expressed in the art. The subsequent withdrawal of funding because of this dislike or potential dislike is discrimination based on viewpoint. If a government entity discriminates on the basis of viewpoint while at the same time encouraging a diversity of views, the government entity's action is unconstitutional according to *Rosenberger*.

Finally, the use of censorial community values is unconstitutional under the rationale set forth by the *Pico* plurality decision.[120] *Pico* states that a government entity cannot act to withhold speech if the government entity is motivated by a

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[117] Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 189–190 (E.D.N.Y. 1999).

[118] *See* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 834 (1995).

[119] Perhaps one could even characterize this withdrawal of funding as a "negative subsidy." *See* Redish & Kessler, *supra* note 20, at 558. Redish and Kessler state:

> A negative subsidy conditions receipt on a potential speaker's decision either to refuse to speak or to cease speaking.... Under our structure, negative subsidies are presumptively unconstitutional. The structure finds them constitutional only in those cases in which current First Amendment jurisprudence would uphold an affirmative imposition of a burden, such as when the government imposes a fine or prison sentence for expression falling outside the scope of the First Amendment....

Id. at 557.

Under this analysis, the withdrawal of funding is an unconstitutional negative subsidy because the government entity conditions the subsidy on the artist's or museum's decision to cease speaking by withdrawing the art. That is to say, when a government entity withdraws funding from art through the use of censorial community values, the museum must stop exhibiting the offensive art to receive the funding again. Thus, the government entity negatively subsidizes art because in order to receive the funding, the museum or artist must forego their constitutional right to expression.

[120] Once again, the author recognizes that the plurality decision is not to be given full precedential value. *See supra* note 105. However, when taken in conjunction with the *Finley* and *Rosenberger* decisions, the *Pico* plurality's rationale supplements the argument that the use of censorial community values is viewpoint discrimination.

desire to deny access to speech because of disagreement with the speech.[121] When a government entity acts to withhold funding from art, it is, in effect, attempting to withhold access to that art altogether.[122] If the art cannot be shown in a museum because a government entity evicts the museum,[123] the government entity removes the art speech from the community and "prescribe[s] what shall be orthodox in . . . matters of opinion."[124] Furthermore, if the government entity uses censorial community values to justify its withdrawal of funds, it acts out of disagreement with the art. Offense to the community's values is basically the same as disagreement with the art. Thus, if the government entity retaliates against art by withdrawing funding or access, it does so out of disagreement with that art and thereby violates the rule set forth in the *Pico* plurality decision.

b. *Later Refusal to Renew Funding*

A government actor's later refusal to renew funding[125] based on offense to the community's values is unconstitutional for the same reasons.[126] However, this

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[121] Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982).

[122] *See* Redish & Kessler, *supra* note 20, at 553 (stating that in considering "[w]hen government ties subsidies to expression," the major inquiry is whether the government's refusal to subsidize actually penalizes protected expression). "One easily could conceive a government subsidy so central to an individual's well being that the denial of it will, as a practical matter, have at least as much adverse impact as would a fine or prison sentence." *Id.* at 554 (footnote omitted). The withdrawal of funding from art could have the same impact as a fine because this withdrawal takes money away from the artist or museum and forces them to look elsewhere, expending valuable time, in order to display the art.

[123] Cuban Museum of Arts v. City of Miami, 766 F. Supp. 1121, 1125–27 (S.D. Fla. 1991).

[124] *Pico,* 457 U.S. at 872 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[125] For example, in the *Brooklyn Institute of Arts and Sciences* case, the museum's contract with the City of New York provides that "'[the City] shall pay to the [Institute] each year such sum as may be necessary for the maintenance of said Museum Building, or as may be authorized by law or be apportioned or appropriated by [the City].'" Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 189 (E.D.N.Y. 1999). In the future, if the city decides to provide the museum with less funding than it has provided in the past based on its disapproval of the Sensation Exhibit, one could argue the city used censorial community values to discriminate based on viewpoint. For a discussion of this case and the Sensation Exhibit, see *supra* Part II.C.2.

[126] This author is not arguing that refusal to renew art funding always constitutes viewpoint discrimination and is unconstitutional. This author recognizes that often government actors need to curtail art funding for financial, administrative, and other reasons that do not represent viewpoint discrimination. However, when a government actor uses censorial community values in refusing to renew funding, the failure to renew funding is viewpoint discrimination. Of course, finding viewpoint discrimination in the context of failure to renew funding may be difficult to prove. However, if an art museum or artist can indeed prove the

is certainly a more difficult issue because of the holding in *Rust* allowing the government to selectively fund activities.[127] Critics could analogize a decision to renew funding to the initial decision to grant funding in which the government is afforded discretion to choose what it desires to fund.

However, several problems would be present in a government's failure to renew funding by using censorial community values. First, *Rosenberger* specifically distinguished *Rust*'s approval of government discretion when the government is the speaker[128] from a situation in which the government seeks to encourage diversity of views. Thus, when the government is not the speaker "but expends funds to encourage a diversity of views from private speakers," the government may not discriminate on the basis of viewpoint.[129] Unless a city specifically sets out to fund a certain exhibit of the museum or a museum that has a particular purpose such as African-American history, the city cannot be a speaker in the arts funding context. Because the city is not the speaker, *Rust* would not apply and the city would not be able to dictate the art exhibited by a museum by refusing to renew funding. The city's action would be outside the rule set forth in *Rosenberger* because by refusing to renew funding for an art museum, the city would be discriminating on the basis of viewpoint while at the same time encouraging diversity of viewpoint.

Second, government funding of art is not a new phenomenon.[130] It would be difficult to conclude viewpoint discrimination did not exist if a city refused to renew traditional art funding after the city used censorial community values to justify an attempt to withdraw funding. If the use of censorial community values is viewpoint discrimination when withdrawing art funding, it follows that the use

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government actor used censorial community values to refuse to renew funding, this viewpoint discrimination should not go unpunished simply because normally it is difficult to prove or because a government actor is usually given more discretion in choosing to grant funding as opposed to withdrawing funding.

[127] For a discussion of the facts and holding of *Rust*, see *supra* note 34. *Rust* held that it is not unconstitutional for the government to "selectively fund a program to encourage certain activities . . . ." 500 U.S. at 193. The *Rust* Court stated, "'A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.'" *Id.* (citing Harris v. McRae, 448 U.S. 297, 317 n.19 (1980)). Thus, the example of funding renewal could appear to fall within the *Rust* analysis and allow the government to fund a museum with less money.

[128] *See* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 833 (1995).

> [I]n *Rust v. Sullivan*, . . . [w]e recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Id.

[129] *Id.* at 834.

[130] *See* Walker, *supra* note 112, at 938–40 (discussing government art funding).

of censorial community values should be viewpoint discrimination when refusing to renew art funding, especially if the city had a long tradition of funding a particular museum.[131]

The previous use of censorial community values would seem to be evidence of the presence of censorial community values in the funding renewal context.[132] In fact, this type of government behavior could be classified as a penalty or an unconstitutional condition because the government would be punishing the museum for showing the disapproved art by not renewing funding and stating that the museum could not receive funding if it exhibited offensive art. The Supreme Court has held: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'"[133]

Third, the government could have even more trouble refusing to renew the art funding if the funding contract is similar to the one between the Brooklyn Institute of Arts and Sciences and the City of New York. This contract provides that the city funding be used only for maintenance.[134] Hence, the likelihood that the city is actually the speaker under the *Rosenberger* analysis is minimal or nonexistent because the city is only funding maintenance, not art.

Of course, difficulty may lie in proving the government actor refused a

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[131] For example, the Brooklyn Museum of Arts and Sciences has been funded for a long time by the City of New York. *See* Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 187 (E.D.N.Y. 1999). Therefore, a refusal to renew funding, following an attempt to withdraw funding due to offense to the community, could be perceived as a result of the use of censorial community values.

As long as Mayor Giuliani is in office, its seems as though the Brooklyn Museum of Arts and Sciences is not in danger of a refusal to renew funding. *See* Feuer, *supra* note 59. The settlement agreement between the museum and the city precluded the mayor from reducing the museum's funding "by any amount 'disproportionately greater' than that of seven other New York museums." *Id.* ("The agreement is binding until [Mayor Giuliani] leaves office.").

[132] One author argued, "The decisionmaker's past behavior, however, usually justifies the court's strong suspicion of his motives and its concomitant scrutiny of the merits of a new decision and requirement of prophylactic measures." Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95, 127 (1971) (footnotes omitted). Thus, difficulty in proving a government entity used censorial community values to refuse funding for art could be alleviated by proof of the government entity's previous reaction to the art and immediate attempt to withdraw funding.

[133] Perry v. Sinderman, 408 U.S. 593, 597 (1972) (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)). For a discussion of the unconstitutional conditions doctrine, see generally Kathleen Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413 (1989).

[134] *Brooklyn Inst. of Arts and Sciences,* 64 F. Supp. 2d at 184. The contract defines maintenance activities as: "(1) repairs and alterations; (2) fuel; (3) waste removal; (4) wages of employees providing essential maintenance, custodial, security and other basic services; (5) cleaning and general care; (6) tools and supplies; and (7) insurance for the building, furniture and fixtures." *Id.*

renewal of funding through the use of censorial community values.[135] A government actor could plausibly argue the refusal was based on a lack of funding or for some other administrative or financial reason.[136] An art museum or artist could have quite a large amount of difficulty proving refusal to renew funding was based upon censorial community values. However, during litigation over this question, courts could adopt the test proposed in Part III.D.2 and ask whether offense to community values was the blatant or pretextual basis for the refusal.[137]

2. *The Test for Determining Whether a Government Entity Used Censorial Community Values to Withdraw Funding from or Access to Art*

Because the use of censorial community values is unconstitutional as viewpoint discrimination, it is essential for courts to recognize when a government entity uses censorial community values to justify the withdrawal of funds from or access to art. This author has developed a three-step test that courts can use to determine whether a government entity has acted unconstitutionality by using censorial community values.[138]

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[135] Typical difficulty in proving the use of censorial community values should not foreclose the ability to recover if the use of censorial community values actually can be proved in a certain case. *See* Brest, *supra* note 132, at 120 ("It is often impossible to establish that a decisionmaker entertained an illicit or suspect objective. But this does not justify a blanket refusal to undertake the inquiry if a decisionmaker's motivation can sometimes be determined with adequate certainty.").

[136] Brest actually argued that a government entity's unconstitutional purpose could be inferred from a specific time frame of events. *Id.* at 122 ("The following chronological sequence, for example, is typical of a variety of cases: the decisionmaker enforces a discriminatory operative rule; a court enjoins this practice; the decisionmaker then adopts a constitutionally 'innocent' rule that effectively maintains the *status quo ante*."). In comparison, this author would argue that a government entity's attempt to withhold art funding due to offense to community values, lack of success at censoring the art, and later refusal to renew funding is a similar time frame of events that should prove a government entity's unconstitutional use of censorial community values. Brest stated, "The decisionmaker's past behavior, however, usually justifies the court's strong suspicion of his motives and its concomitant scrutiny of the merits of a new decision and requirement of prophylactic measures." *Id.* at 127 (footnotes omitted). Thus, difficulty in proving a government entity used censorial community values to refuse funding for art could be alleviated by proof of the government entity's previous reaction to the art and immediate attempt to withdraw funding.

[137] *See supra* Part III.D.2.

[138] One author argued that, in the arts context, the government should be required to meet the same strict scrutiny test used in analyzing government interference with political speech. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 102 (1996).

> Art is a countervailing force. Because of its threat to the status quo, the government has an almost irresistible urge to meddle with it. Whether the government is funding, distributing, or suppressing artworks, there should be a presumption that such meddling is unconstitutional. The

First, the court must ask whether the withdrawal of funds or access to art occurred after a government entity granted such funding or access. This part of the test deals with the component of the definition of censorial requiring the banning to occur after examination.[139] This is a rather simple inquiry and requires only cognizance of the time frame in which the incident occurred. If the answer to this inquiry is in the negative, the censorial community values analysis ends. The analysis ends because I have specifically limited the definition of censorial community values in this note to those community values used to censor art that the government already funded. As the discussion in Part II.B illustrates, the use of censorial community values to withdraw funds after a government entity granted such funding is a good indicator that the government entity engaged in viewpoint discrimination. If the court answers this question affirmatively, the court must move on to the second prong.

Second, the court must consider whether the government entity blatantly used community values to justify the withdrawal of funds or access.[140] Basically, this inquiry requires the court to determine whether the government entity specifically stated that its purpose in withdrawing funding or access to art was to forego offense to the community's values. If the answer to this inquiry is no, the court must move on to the third prong. If the answer to this question is in the affirmative, the government entity used censorial community values unconstitutionally to justify the withdrawal of funds. For example, in *Brooklyn Institute of Arts and Sciences,* Mayor Giuliani stated, "You don't have a right to a government subsidy to desecrate someone else's religion."[141] Furthermore, the ejectment action filed by the city specifically alleged that the art would offend the community.[142] Hence, in this case, the mayor and city blatantly used censorial

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government can overcome this presumption only if its regulation passes the strict scrutiny now applied to political speech.

Id.

[139] *See supra* note 21 and accompanying text.

[140] The second prong of the test basically asks whether the government actor blatantly discriminated on the basis of viewpoint. This type of analysis follows *Rosenberger* because the Appropriations Committee of the Student Council denied the religious group's request for newspaper funding because the group "was a 'religious activity' within the meaning of the Guidelines, i.e., that the newspaper 'promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.'" Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 827 (1995). The government actor in *Rosenberger* thus blatantly discriminated on the basis of viewpoint because the justification for the discriminatory denial of funds was specifically the viewpoint expressed by the newspaper. *See id.* The Court stated, "Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." *Id.* at 835.

[141] Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 191 (E.D.N.Y. 1999).

[142] *Id.* at 192. The city claimed it filed an action for ejectment because the museum violated its lease, contract, and enabling legislation by:

community values to justify the withdrawal of art funding from the museum. Because both the mayor and the ejectment action stated that the reason for the city's action was potential offense to the community, the attempt to withhold funding was in retaliation to the potential offense that community would feel upon seeing the exhibit.

Another example of the blatant use of censorial community values to justify the withdrawal of access to art is discussed in Part III.C.3. While the director of the Detroit Institute of Arts is not a government actor, he blatantly used censorial community values to justify canceling the exhibit.[143] The director issued a press release postponing the exhibit because he feared "it would 'cause offense to important parts of our community.'"[144] Thus, the director of the Detroit Institute of Arts overtly stated his purpose in canceling the exhibit, after showing it for two days,[145] was to avoid offense to the community. Therefore, he blatantly used censorial community values to justify withdrawing access to the art.

Finally, the court must ask whether the entity's stated justifications were only a pretext[146] for the concern for community values.[147] This part of the test looks

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(1) imposing a $9.75 admission charge for the Exhibit, without the Mayor's approval; (2) violating the Museum's obligation to "educate and enlighten school children and the public" and to serve a public purpose, in that the Museum intended to proceed with the Exhibit, *which the City contend[ed] contain[ed] inappropriate, "sensational" matter that is "offensive to significant segments of the public;"* and (3) improperly furthering "the commercial interests of private parties," rather than public purposes, because the works in the Exhibit c[a]me from the private collection of Charles Saatchi, who is a client of Christie's, the auction house, which also gave financial support to the Exhibit.

Id. (emphasis added). Thus, in addition to the mayor's comments specifically stating the exhibit offended the community's religious values, the city based its ejectment action on the offensiveness of the art to the community. *Id.*

143 See *supra* note 50 for a description of the exhibit.

144 Duin, *supra* note 65, at A7.

145 Meredith, *supra* note 63, at 10.

146 This type of analysis is common to First Amendment jurisprudence. For example, in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 45, 54 (1986), the Court upheld the constitutionality of a zoning ordinance when applied to two adult film theaters. The Court stated, "Renton has not used 'the power to zone as a pretext for suppressing expression. . . .'" *Id.* at 54 (citing Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 84 (1976) (Powell, J., concurring)). The implication of this statement, therefore, is that if the city had used its zoning powers as a pretext to suppressing the theaters' First Amendment speech rights, the Court would have found the city's action unconstitutional. *See also* Arcara v. Cloud Books, 478 U.S. 697, 707 n.4 (1986) ("Respondents assert that closure of their premises is sought as a pretext for suppression of First Amendment protected expression. . . . Were respondents able to establish the existence of such a speech suppressive motivation or policy . . . they might have a claim of selective prosecution."); Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985) ("We express no opinion on the question whether petitioner's explanation is merely a pretext for viewpoint discrimination.").

behind the government entity's stated purpose for withdrawing funding to see if the entity's real purpose was retaliation against the art for actual or potential offense to the community's values. If the answer is yes, the government entity used censorial community values to justify its withdrawal of funding. For example, in *Cuban Museum of Arts,* the court found that the city's real purpose in attempting to evict the museum was the avoidance of controversy[148] and offense to the members of the community that disapproved of the art.[149] While the city

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In fact, the trial court in *Brooklyn Institute of Arts and Sciences* applied this type of rationale to find that New York City used alleged lease violations as a pretext for viewpoint discrimination. The court stated, "the [Cuban Museum of Arts and Culture] Court found that the exhibition was fully protected by the First Amendment, ... and that the claimed lease violations were pretextual.... The same is true here." 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999).

[147] Some may disagree with the suggestion that a court look to a government entity's purpose or motivation for an act. For a discussion of the reasons courts should invalidate illicitly motivated government laws, see Brest, *supra* note 132, at 116–18. Brest set forth several reasons for courts to look into a government entity's decision to withdraw art funding. First, governments are constitutionally prohibited from doing certain acts and should therefore be precluded from such acts even when and unconstitutional motivation cannot be detected. *Id.* at 116. Second, a government entity's consideration of an illicit objective may determine the outcome of a decision. *Id.* Third, a person has a legitimate complaint if a government entity made a decision based on an illicit objective. *Id.* Finally, Brest stated that courts should invalidate a government decision if the court can determine the government entity considered an illicit objective. *Id.* at 117 ("Evidence sufficient to establish that the decisionmaker gave any weight to an illicit objective will also often establish that the decision would not have been made but for the pursuit of that objective.").

[148] *See supra* notes 43–45 and accompanying text for a discussion of this controversy.

[149] Cuban Museum of Arts v. City of Miami, 766 F. Supp. 1121, 1127 (S.D. Fla. 1991) ("More importantly, however, the court notes that the Commission never exhibited any real concern over possible self-dealing and auction profits in connection with directors other than those who had been linked with the controversial art."). The court stated:

> The conduct of the City Commission with respect to the asserted grounds for the denial of continued possession reveals that the reasons asserted were either minor concerns or a pretextual basis upon which to remove the Cuban Museum and its present directors. The reason behind the City's decision was the controversial and highly unpopular views that the plaintiffs had advanced.

Id. Because the city disapproved of the controversy and the community's response to the art, the city tried to evict the museum under the pretextual allegation of a lease violation.

In interpreting and applying the *Cuban Museum of Arts* case to the *Brooklyn Institute of Arts and Sciences* case the court stated, "The Court found that the exhibition was fully protected by the First Amendment, that the absence of a 'right' to renewal [of the lease] did not defeat the First Amendment claim, and that the claimed lease violations were pretextual." *Brooklyn Inst. of Arts and Sciences,* 64 F. Supp. 2d at 200. Thus, the *Brooklyn Institute of Arts and Sciences* court interpreted the *Cuban Museum of Arts* decision as based on Miami's pretextual reasons for evicting the museum. Miami's alleged concerns over self-dealing and the auction were only a pretext for the concern for the community's values.

alleged it wanted to evict the museum for reasons such as concern over an admission charge and failure to comply with insurance requirements,[150] the court found the real purpose for the city's eviction attempt was "the controversial and highly unpopular views that the plaintiffs had advanced."[151] Thus, the city's justifications for evicting the museum and thereby withdrawing access and funding from art were only a pretext for the offense caused to the community's values. If the court answers this question in the negative, the government entity's actions do not constitute a use of censorial community values at least in the context of a withdrawal of funding for or access to art.

IV. CONCLUSION

In conclusion, the use of censorial community values to withdraw funding or access to art is unconstitutional as viewpoint discrimination. The use of censorial community values allows a government actor to ban art that is perceived as offensive to the community. It requires the government actor to look specifically at the viewpoint expressed in the art to determine whether to withdraw the art's funding. The test proposed in Part III.D.2 allows courts to recognize and determine when a government actor used censorial community values and should therefore be used to find censorial community values unconstitutional under the First Amendment.

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[150] *Cuban Museum of Arts*, 766 F. Supp. at 1127.

[151] *Id.*